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IN THE

# Supreme Court of the United States

YASER ESAM HAMDI AND ESAM FOUAD HAMDI, AS NEXT FRIEND OF YASER ESAM HAMDI,
*Petitioners,*

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *et al.*
*Respondents*

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

## BRIEF OF THE CENTER FOR AMERICAN UNITY, FRIENDS OF IMMIGRATION LAW ENFORCEMENT, NATIONAL CENTER ON CITIZENSHIP AND IMMIGRATION, AND REPRESENTATIVES STEVE KING, DANA ROHRABACHER, LAMAR S. SMITH, THOMAS G. TANCREDO, ROSCOE BARTLETT, MAC COLLINS, JOE BARTON, AND JOHN J. DUNCAN, JR. AS *AMICI CURIAE* SUPPORTING AFFIRMANCE

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## QUESTIONS PRESENTED

**Note:** *Amici curiae* respectfully suggest that the Questions presented fairly include the following question:

Whether a person, born in the United States of alien parents in this country on a temporary work visa, who leaves the United States as an infant, never returns, declares himself a citizen of another country, and takes up arms in a conflict against forces of the United States, and otherwise demonstrates no allegiance to the United States and demonstrates allegiance to foreign powers, was ever "subject to the jurisdiction" of the United States under the Fourteenth Amendment's Citizenship Clause.

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## INTEREST OF AMICI CURIAE

*Amici* wish to address a topic overlooked by all parties: whether Petitioner Yaser Esam Hamdi is, in fact, a United States citizen under the Citizenship Clause of the Fourteenth Amendment to the Constitution. Counsel for all parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk.[1]

The Center for American Unity is a national, non-profit educational organization dedicated to preserving our historical unity as Americans into the 21st Century. www.cfau.org. CAU conducts research and monitors developments on a broad range of economic, domestic, defense and foreign policy issues related to the social, historical and political matters of the American nation-state. CAU filed a brief *amici curiae* in *Alexander v. Sandoval,* No. 99-1908 (brief of CAU, 14 Members of Congress and two other organizations).

Friends of Immigration Law Enforcement (FILE) is a national group of attorneys, law enforcement officers, legislators, and others, who work to re-establish the rule of law in the area of immigration to the United States. *See* www.fileus.org. FILE also arranges legal help for Americans who have been victimized or injured by the federal government's failure to enforce immigration law and publishes position papers on various aspects of immigration. FILE filed a motion to intervene in this case in the court below, but no action was taken on its motion.

The National Center for Citizenship and Immigration is a national, nonprofit organization whose mission is to educate the

[1]Pursuant to Rule 37.6, *amici* certify that no person or entity other than *amici* made a monetary contribution to the preparation and submission of this brief, and that no counsel to a party authored this brief in whole or in part.

American people regarding the principles of American citizenship and sound immigration policy in order to bring about a better public understanding of the issues and choices facing the nation due to open borders and unworkable immigration policies and practices. www.ncciamerica.org.

Steve King is a Member of Congress, representing the Fifth Congressional District of Iowa, and is a member of the House Judiciary Committee and the Constitution and Immigration Subcommittees. Dana Rohrabacher is a Member of Congress, representing the 46th District of California, and was the principal spokesman for California's Proposition 187, a successful ballot initiative to deny social services to illegal immigrants, which was later struck down on the basis of the erroneous interpretation of the Citizenship Clause of Fourteenth Amendment discussed in this brief. *See*, P. 23 *infra*. Lamar Smith is a Member of Congress, representing the 21st District of Texas, and is a Member of the Judiciary Committee and the Immigration Subcommittee. Thomas G. Tancredo is a Member of Congress, representing the Sixth District of Colorado, and is the Chair of the Congressional Immigration Reform Caucus. Roscoe Bartlett is a Member of Congress, representing the Sixth District of Maryland. Michael "Mac" Collins is a Member of Congress, representing the Eighth District of Georgia, and is Deputy Majority Whip of the House. Joe L. Barton is a Member of Congress, representing the Sixth District of Texas, and is Chairman of the House Committee on Energy and Commerce. John J. Duncan, Jr., is a Member of Congress, representing the Second District of Tennessee, and is a former state court judge.

*Amici* believe that this Court's recent decisions have weakened or ignored the jurisdictional requirement in the Citizenship Clause of the Fourteenth Amendment ("and subject to the jurisdiction thereof"). *Amici* respectfully request this Court to avoid further weakening or ignoring the jurisdictional



requirement in the Citizenship Clause in any decision in this case.

## PRELIMINARY STATEMENT

Petitioner Yaser Esam Hamdi ("Hamdi") was apparently born on September 26, 1980, at Womens' Hospital in the Parish of East Baton Rouge, Louisiana to Petitioner Esam Fouad Hamdi and to Nadiah Hussen Fattah, both Saudi citizens.[2] Esam Hamdi worked as a chemical engineer for Saudi Arabia Basic Industries, Inc. The Hamdis were in the United States on some form of temporary work visas, and left when Hamdi was still an infant. Hamdi apparently never returned to the United States.

When questioned after his capture on the battlefields of Afghanistan, Hamdi told his interrogators that he was a Saudi citizen. Affidavit of Special Adviser Michael Mobbs ("Mobbs Decl."), J.A. 61, ¶ 5 (Hamdi identified himself to the U.S. interrogation team "as a Saudi citizen who had been born in the United States.").

Although Petitioners flatly assert that Hamdi is a citizen, Brief for Petitioners, 4 ("Hamdi is an American citizen by birth. J.A. 10-11."), the Government notes only that Hamdi is "a presumed citizen." Brief for Respondents in Opposition to Petition, I, 5 n. 4 ("a presumed American citizen such as Hamdi"). Hamdi apparently was born in the United States, but beyond the accident of birth, his circumstances do not seem to satisfy the phrase "and subject to the jurisdiction thereof" in the Citizenship Clause of Section 1 of the Fourteenth Amendment (hereinafter "the jurisdiction requirement").

As discussed in more detail below, this Court's comments and decisions on the jurisdiction requirement in

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[2]Louisiana Certificate of Live Birth 117-1980-058-00393

recent years have exacerbated the problem of illegal immigration to this country. In some areas, a huge percentage of births are to illegal immigrants.[3]

Yet the problem is not confined to illegal immigration. Thousands of pregnant women legally come to the United States each year just to give birth.[4] These aliens have no ties or allegiance to the United States. "Indeed, most are eager to fly home as soon as they can get the birth certificates and passports for their newborns." Barbara Demick, "The Baby Registry of Choice," *The Los Angeles Times*, May 25, 2002, A-1, Col. 1 (most common reason for desiring American birth is to avoid mandatory Korean military service).

This process might be termed "drive-by citizenship," and it is a large and growing problem for the United States: "Thousands of pregnant South Koreans travel to the U.S. to give birth to American citizens. A mini-industry has been created to serve them. . . . 'From birth to citizenship,' advertises one Korean-language Web site (www.birthinusa.com) that helps women give birth in Los Angeles." *Id.*

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[3]Sarah Adams, "The Basic Right of Citizenship: A Comparative Study," Center for Immigration Studies, Sept. 1993, www.cis.org/articles/1993/back793.html (citing Los Angeles County Supervisor Mike Antonovich that two-thirds of all live births in Los Angeles County hospitals are to illegal aliens)

[4]Prabhat K. Mukherjee, "Thoughts of the Times: American Dream," *The Korea Times*, December 1, 2003, http://times.hankooki.com/cgi-bin/hkiprn.cgi?pa=/lpage/opinion/200312/kt2003120119273511390.htm&ur=times.hankooki.com&fo=print_kt.htm Nancy Cleeland, "Born in the USA: Births to Illegal Immigrants on the Rise," *San Diego Union-Tribune*, Feb. 20, 1994, http://members.lycos.co.uk/lamigra/NEWS/AnchorBabies940220SDUT.html



If an alien who is present in the United States for mere moments during birth can impart citizenship, the jurisdiction requirement ceases to have effective meaning. "Drive-by citizenship" conflicts with the concept of citizenship envisioned by the drafters of the Fourteenth Amendment, and poses significant challenges to the United States.

While earlier decisions of this Court reflected that dilemma by seriously considering the jurisdiction requirement, in recent years this Court's decisions have effectively nullified the jurisdiction requirement. This case shows the reach of that nullification.

In the present case, a person with no allegiance to the United States is "presumed" or declared to be a citizen "by birth." Pet. Br. 4. Yet, to come within the jurisdiction requirement, it is not enough that Hamdi was born in Louisiana. He must also show that he was "subject to the jurisdiction" of the United States, as that phrase (the jurisdiction requirement) was meant in the Fourteenth Amendment.

Petitioners themselves note the distinction between citizen and aliens in their opening brief: "The Court therefore has taken pains to distinguish between citizens and enemy aliens in the context of the war powers." Pet. Br. 33. Petitioners cite *Ambach v. Norwick*, 441 U.S. 68, 75 (1979) for the principle that "the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance." *Id.*

Oddly, Petitioners note no irony in the fact that Hamdi himself has absolutely no such association with the American polity. He never had such an association.

Petitioners' residence was ephemeral, and neither Hamdi nor his parents demonstrated allegiance to the United

States in any way. Hamdi left the United States as an infant, never returned, declared himself a citizen of Saudi Arabia, and engaged in a conflict against the United States and its allied forces. His actions are inconsistent with any allegiance to the United States. His actions clearly reject being "subject to the jurisdiction" of the United States.

If the United States is ever to confront issues raised by "drive-by citizenship," the decision of this Court in this case should not further complicate or expand the issues presented by the jurisdiction requirement. This brief asks whether, in light of these circumstances, the Court should deem Hamdi a citizen. Was he ever, asks this brief, "subject to the jurisdiction" of the United States? This brief also asks the Court to respect the jurisdiction requirement of the Citizenship Clause – in its original intention of requiring some allegiance to the United States – or at least, not to further weaken or ignore it in any decision in this case.

## SUMMARY OF ARGUMENT

The Citizenship Clause of the Fourteenth Amendment was added during Senate debate. During the debate, the authors discussed in great detail their purpose and intentions in adding the requirement that a person be born, not just in the United States, but "subject to the jurisdiction thereof." Sen. Howard, sponsor and author of the Citizenship Clause, when questioned about the meaning of "jurisdiction," responded that the phrase was intended to be read as meaning "not owing allegiance to anybody else." Sen. Trumbull, Chairman of the Judiciary Committee, described persons who "are not subject to our jurisdiction in the sense of owing allegiance solely to the United States." Chairman Trumbull noted that even "partial allegiance if you please, to some other government" is



sufficient to disqualify a person under the jurisdiction requirement.

For three decades following the adoption of the Fourteenth Amendment, this Court recognized the jurisdiction requirement of the Citizenship Clause as including a non-geographical distinction between those with allegiance and those without. In *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873), this Court noted that the jurisdiction clause was "intended to exclude from its operation . . . citizens or subjects of foreign states born within the United States." In *Elk v. Wilkins*, 112 U.S. 94, 101 (1884), the Court described the jurisdiction clause as covering "all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power."

In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), however, Justice Gray wrote an opinion which eviscerated the jurisdiction requirement. Justice Gray felt that, once within a national territory, an alien gives up allegiance to all other governments, at least temporarily. 169 U.S. at 693 (alien's "allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory."). Thus, any alien born within the United States would automatically gain citizenship without reference to the jurisdiction requirement.

Yet this analysis of allegiance is foreign to American history, earlier precedent and logic. Under that analysis, for example, there would be no need to require aliens to take an oath of naturalization renouncing all allegiances to foreign powers. Similarly, the naturalization cases continue to require some type of "talisman of dedicated attachment" on the part of an applicant for citizenship. *Rogers v. Bellei,* 401 U.S. 815, 834 (1971).

Unfortunately, Justice Gray's faulty analysis of the jurisdiction requirement was cited in later decisions for the proposition that a child of alien parents "born in the United States, was a citizen of this country," without further analysis. *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985). In fact, in *Plyler v. Doe*, 457 U.S. 202, 211 (1982), the Court went further, suggesting that the authors of the Citizenship Clause used the term "jurisdiction" in a "predominantly geographic sense." Again, the *Plyler* opinion included no reference to or use of any allegiance analysis, even though the authors had made such an analysis central to the Citizenship Clause. The evisceration of the jurisdiction requirement creates a powerful magnet for "drive-by citizenship."

The jurisdiction requirement should be applied in this case. Hamdi has no allegiance or attachment to the United States. His is a classic case of "drive-by citizenship." His and his parents' residence was temporary. They remained at all times subjects of the Saudi government. Neither Hamdi nor his parents ever demonstrated any intention of remaining in the United States (and under the terms of their temporary visas, they could not have). They never acted in a manner consistent with the "association with the polity" which Petitioners themselves cite as a requisite of citizenship. Pet. Br. 33, *citing Ambach v. Norwick*, 441 U.S. 68, 75 (1979).

How, in these circumstances, can Hamdi claim the same citizenship rights as a person born "subject to the complete jurisdiction" of the United States? Hamdi is in the same position as John Elk, the Native American denied citizenship in an opinion by Justice Gray for the Court in *Elk v. Wilkins*. He may have been born within the territory of the United States, but he shows no "talismans of dedicated attachment" to this country.



The Court should apply the jurisdiction requirement in its intended form – including an allegiance requirement – and determine whether Petitioner Hamdi is, in fact, "an American citizen by birth."

## ARGUMENT

### I. The Jurisdiction Requirement in the First Sentence of Section One of the Fourteenth Amendment Means Something More Than Just Geography of Birth:

The jurisdiction requirement of Section One of the Fourteenth Amendment must mean something. The jurisdiction requirement was added to the draft of the Fourteenth Amendment by the Senate after a lengthy and acrimonious debate. CONGRESSIONAL GLOBE, May 30, 1866, 39th Congress, 1st Session, pp. 2890-97. Both contemporary jurisprudence and the authors' expressed statements indicate that the jurisdiction requirement was to include some indication of allegiance to the country in addition to the geography of birth. As a later case described it in the context of naturalization, the Founders sought some "talisman of dedicated attachment." *Rogers v. Bellei*, 401 U.S. 815, 834 (1971), *citing*, *Weedin v. Chin Bow*, 274 U.S. 657, 666-67 (1927).

#### *A. Allegiance to the United States Was Important to the Authors of the Fourteenth Amendment:*

As early as the Act of Jan. 29, 1795 (1 Stat. 414, c. 20), applicants for naturalization to the new United States were required to absolutely renounce and abjure all allegiance to every foreign prince or state, and to support the Constitution. The English common law theory of absolute and perpetual allegiance to the Crown from birth was rejected. 8 Ops. Atty

Gen. 139 (1856), 9 Ops. Atty Gen. 356 (1859). Citizenship thus required some demonstration of allegiance to the United States.

The drafters of the Fourteenth Amendment, and the earlier Civil Rights Act of 1866 (14 Stat. 27, c. 31), were well aware of this difference between the old English system of permanent allegiance by birth and the new American system of some form of allegiance by choice and consent. "It is perfectly clear that the mere fact that a man is born in the country has not heretofore entitled him to the right to exercise political power." CONGRESSIONAL GLOBE, *supra*, 2890 (Sen. Cowan).

On May 30, 1866, on the floor of the Senate, Senator Jacob Merritt Howard of Michigan proposed an amendment to the Fourteenth Amendment resolution passed by the House of Representatives. *Id.*, 2890. The amendment, ultimately enacted without change as the first sentence of Section One of the Fourteenth Amendment, read: "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." *Id.*

Sen. Howard said that "this will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons."[5] *Id.*

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[5]Much confusion might have been avoided if it were clear whether Sen. Howard was speaking of different groups ("who are foreigners, aliens" OR "who belong to the families of ambassadors"). As discussed *infra*, the shift in this Court's decisions in 1898 was whether the jurisdiction requirement would be limited only to three enumerated groups – including children of diplomats – or was intended to cover the children of "foreigners, aliens" more generally. *Compare, e.g., The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873) (jurisdiction requirement was "intended to exclude from its operation children of

(continued...)



Sen. James Doolittle of Wisconsin proposed an amendment to Howard's amendment to add language to exclude "Indians not taxed." *Id.* Sen. Edgar Cowan of Pennsylvania asked questions about the definition of citizen:

> If [the children of Chinese immigrants in California and Gypsies in Pennsylvania are citizens], what rights do they have? **Have they more rights than a sojourner in the United States?** If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled, to a certain extent, to the protection of the laws. . . . He has a right to the protection of the laws; but he is not a citizen in the ordinary acceptation of the word."

*Id.* (Emphasis added).

Sen. Cowan noted that he had been unable to get answers to his questions, either from his discussions about the Fourteenth Amendment, or from decisions of the Supreme Court. *Id.* Cowan read prior law as permitting States to describe certain rights of "aliens and others who acknowledge no allegiance, either to the State or the General Government."*Id.* Cowan asked for clarification of rights: "Or is it only that he is entitled as a sojourner to the protection of the laws while he is within and under the jurisdiction of the courts?" *Id.*, 2891.

Sen. John Conness of California, himself an immigrant from Ireland, responded to Sen. Cowan's questions by declaring that his intention was to "declare children of all parentage

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[5](...continued)
ministers, consuls, **and** citizens or subjects of foreign states born within the United States"; emphasis added) and *United States v. Wong Kim Ark*, 169 U.S. 649, 694 (1898) ("it can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides.").

whatever, born in California, should be regarded as citizens of the United States." *Id.* There followed discussion of the need for language excluding "Indians not taxed" from the language.

Finally, Sen. Lyman Trumbull of Illinois, the Chairman of the Judiciary Committee and a member of the Committee of Fifteen which drafted the Fourteenth Amendment, stepped forward to explain the jurisdiction requirement:

> The provision is, that 'all persons born in the United States, and subject to the jurisdiction thereof, are citizens.' That means 'subject to the complete jurisdiction thereof.' . . . What do we mean by 'subject to the jurisdiction of the United States?' **Not owing allegiance to anybody else**. That is what it means. Can you sue a Navajoe [*sic*] Indian in court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them."

*Id.* (emphasis added).

Chairman Trumbull continued: "It cannot be said of any Indian **who owes allegiance, partial allegiance if you please, to some other government that he is 'subject to the jurisdiction of the United States**.'" *Id.* (emphasis added). Trumbull thought Sen. Doolittle's amendment regarding "Indians not taxed" was unnecessary. *Id.*

Sen. Reverdy Johnson of Maryland, the lone Democrat participating in the debate, then spoke up to support Doolittle's amendment as a clarification. "Now all this amendment provides is, that all persons born in the United States **and not subject to some foreign Power** – for that, no doubt, is the meaning of the committee who have brought the matter before – shall be considered as citizens of the United States." *Id.* (emphasis added). Johnson suggested that Doolittle's



amendment would do no harm if it were adopted, *id.*, and pointed out that the language of the recently-passed civil rights bill had "the same provision"[6] in it. *Id.*, 2894.

> I read now from the civil rights bill as it passed: 'That all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens.' What did these words mean? They meant something; and their meaning as they are inserted in that act is the same meaning which will be given to them if they are inserted in the first section of this constitutional amendment.

*Id.*

In further remarks, Chairman Trumbull repeated his description of "Indians being subject to our jurisdiction. They are not subject to our jurisdiction in the sense of **owing allegiance solely to the United States**." *Id.* (emphasis added). Reminded that Supreme Court decisions treated Indians as "subjects" and not as citizens, Trumbull replied: "In some sense they are regarded as within the territorial boundaries of the United States, but I do not think they are subject to the jurisdiction of the United States in any legitimate sense; certainly not in the sense that the language is used here." *Id.*

After more discussion, Sen. Howard, the author of the original amendment, said:

> I concur entirely with the honorable Senator from Illinois, in holding that the word 'jurisdiction,' as

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[6]This uncontradicted and repeated statement that the phrases in the Civil Rights Act and the jurisdiction requirement were intended to have the same effect was ignored in *Wong Kim Ark*, 169 U.S. at 688 ("the negative words of the civil rights act, 'not subject to any foreign power,' gave way, in the fourteenth amendment of the constitution, to the affirmative words, 'subject to the jurisdiction of the United States.'").

here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, . . . . that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now.

*Id.*

Sen. Howard summed up the debate by saying:

> In one sense, all persons born within the geographical limits of the United states are subject to the jurisdiction of the United States, but they are not subject to the jurisdiction of the United States in every sense. Take the child of an ambassador. In one sense, that child born in the United States is subject to the jurisdiction of the United States, because if that child commits the crime of murder, or commits any other crime against the laws of the country, to a certain extent he is subject to the jurisdiction of the United States, but not in every respect; and so with these Indians. . . . I understand the words here 'subject to the jurisdiction of the United States,' to mean fully and completely subject to the jurisdiction of the United States.

*Id.*, 2897.

The Senate then rejected Sen. Doolittle's amendment on Indians by a recorded vote, and passed the amendment to the proposed Fourteenth Amendment on a voice vote. *Id.*

Certain lessons can be drawn from this debate. The authors of the Fourteenth Amendment did not want to grant citizenship to every person born in the United States. They wanted to grant citizenship only to persons born here who were also "subject to the jurisdiction" of the United States. They understood that phrase to be the same as the phrase "and not subject to any foreign Power," used in the recent civil rights



bill. And by "subject to the jurisdiction," they meant "subject to the jurisdiction of the United States in every sense," and "[n]ot owing allegiance to anybody else." Even "partial allegiance" was sufficient to demonstrate that a person was not subject to the "complete jurisdiction" of the United States.

The authors made a distinction between those within the jurisdiction of the United States and "a sojourner in the United States," or "a traveler [who] comes here from Ethiopia, from Australia, or from Great Britain." In other words, the authors of the jurisdiction requirement were concerned about "drive-by citizenship" and thought that the jurisdiction requirement would exclude persons who had even a "partial allegiance" to another government.

*B. This Court's Initial Applications of the Jurisdiction Requirement Reflected the Authors' Intentions:*

For three decades following the Senate debate noted above, this Court recognized the jurisdiction requirement as including a non-geographical distinction between those with allegiance and those without. In *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873), the Court noted that the phrase "subject to the jurisdiction thereof" was "intended to exclude from its operation children of ministers, consuls, **and citizens or subjects of foreign states born within the United States.**" 83 U.S. at 73 (emphasis added).

In *Minor v. Happersett*, 88 U.S. 162 (1874), the Court said:

> At common-law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners.

> Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. **As to this class there have been doubts**, but never as to the first.

88 U.S. at 167-68 (emphasis added).

In *Elk v. Wilkins*, 112 U.S. 94 (1884), Justice Gray, for the Court, described the jurisdiction requirement as intended "to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and **owing no allegiance to any alien power**, should be citizens of the United States." 112 U.S. at 101 (emphasis added). Justice Gray continued: "The evident meaning of these last words ["subject to the jurisdiction thereof"] is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance." 112 U.S. at 102.

This Court should not, in any decision in this case, ignore or undermine this clear intent by suggesting that geography is the sole determinant of citizenship. The Court should find meaning in the jurisdiction requirement.

**II. Some of This Court's More Recent Interpretations of the Jurisdiction Requirement Are Inconsistent With American History, Earlier Precedent and the Explicit Intention of the Authors of the Jurisdiction Requirement:**

Unfortunately, some of this Court's more recent precedents don't reflect the authors' intentions, as expressed in the debate described above. In fact, some of this Court's rulings appear to contradict the authors' intentions, and make assertions directly opposite to those expressed in the debate.

The most extensive – and problematic – discussion of the jurisdiction requirement is in *United States v. Wong Kim*



*Ark*, 169 U.S. 649 (1898). In *Wong*, the Court considered whether:

> "a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but **have a permanent domicil and residence in the United States**, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution."

169 U.S. at 653 (emphasis added). The Court, in an opinion by Justice Gray, held that the child does become a citizen. 169 U.S. at 705.

This result is consistent with the Senate debate discussed above. As Justice Gray noted in passing, during the Senate debates on both the civil rights act and the jurisdiction requirement in the Fourteenth Amendment, the question of the American-born children of Chinese immigrants was explicitly discussed and the expressed intention was that these children would be citizens. 169 U.S. at 697-99, *citing* CONGRESSIONAL GLOBE, *supra*, pp. 498, 573, 574, 2890-92.

*A. Justice Gray's Analysis in Wong Kim Ark Conflicts With the Authors' Intentions, This Court's Other Decisions, and Logic:*

Justice Gray's reasoning, however, was inconsistent with earlier decisions of this Court, and the intentions expressed clearly in the Senate debate quoted above. Justice Gray's analysis in *Wong* asserts a different understanding of "allegiance" – the crux of both his and the authors' understanding of "jurisdiction."

To Justice Gray, in *Wong*, once within a national territory, an alien gives up all allegiance to all other governments, at least temporarily. Given the importance the authors placed on allegiance, this belief is crucial to understanding the elemental contradiction between Justice Gray's reasoning and that of the authors of the jurisdiction requirement.

Justice Gray said that an alien's "allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory. . ." 169 U.S. at 693. This, to Justice Gray, was "complete" jurisdiction: "it can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides." 169 U.S. at 694.

Justice Gray's belief in an alien's allegiance shifting in such a total and complete manner simply upon entry to the United States, however, is foreign to American history, this Court's earlier precedents, and logic. Under Justice Gray's analysis, for example, there would be no reason to require aliens to take an oath of naturalization renouncing all allegiances to foreign princes or powers, as had been required since 1795, and continues today. "I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty. . ." 8 U.S.C. § 1448(a)(1) (2001); U.S. Dept. Of Homeland Sec., Oath of Naturalization, http://uscis.gov/graphics/aboutus/history/teacher/oath.htm.

The authors of the jurisdiction requirement apparently believed in a different definition of "complete" jurisdiction and "allegiance." For example, Indians were thought to be within the territory of the United States, but not completely subject to its jurisdiction; this was considered so obvious that it was sufficient reason to defeat Sen. Doolittle's amendment to explicitly exclude Indians:



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> In one sense, all persons born within the geographical limits of the United states are subject to the jurisdiction of the United States, but they are not subject to the jurisdiction of the United States in every sense. Take the child of an ambassador. In one sense, that child born in the United States is subject to the jurisdiction of the United States, because if that child commits the crime of murder, or commits any other crime against the laws of the country, to a certain extent he is subject to the jurisdiction of the United States, but not in every respect; and so with these Indians.

CONGRESSIONAL GLOBE, *supra*, at 2897 (Sen. Howard).

To the authors, as expressed by the amendment's author, Sen. Howard, and the Chairman of the Judiciary Committee, Sen. Trumbull, "subject to the jurisdiction" of the United States meant simply that the person did not "ow[e] allegiance, partial allegiance if you please, to some other government." *Id.*, at 2984 (Sen. Trumbull).

In other words, rather than believing that presence in the United States would immediately and automatically oust any and all other allegiances to other governments, the authors of the jurisdiction requirement believed that allegiance to a foreign government could remain even while an alien was within the territory of the United States. The remaining allegiance to a foreign power, even if only "partial," was cognizable in determining whether someone was "subject to the jurisdiction" of the United States. If a person retained even some allegiance to another government while within the United States, the person was not subject to the "complete jurisdiction" of the United States.

In this Court, naturalization-related cases, including some which cite *Wong*, similarly recognize the continuation of partial allegiance by those residing in the United States and

require some type of residence, allegiance or permanence on the part of the applicant for citizenship. In *Rogers v. Bellei*, 401 U.S. 815, 834 (1971), for example, the Court noted "the importance of residence in this country as the talisman of dedicated attachment", *citing*, *Weedin v. Chin Bow*, 274 U.S. 657, 666-67 (1927).

Seen in this manner, "partial" allegiance analysis is not difficult. Persons born of citizens have no such partial allegiances. Persons on the road to citizenship or otherwise precluded from immediate citizenship could demonstrate allegiance through their intentions to join society as best they could. They have, in other words, "talismans of dedicated attachment." *Rogers v. Bellei*, 401 U.S. at 834. Persons who were only temporary "sojourners" would have more difficulty demonstrating they did not have at least partial allegiances to another power.

This sort of analysis was recognized by this Court in *Elk v. Wilkins*, written by Justice Gray himself. 112 U.S. 94 (1884). In *Elk*, John Elk, an Indian who had forsaken his tribe, sought the right to vote. Elk argued that he had renounced his allegiance to his tribe. Justice Gray, for the Court, rejected his claim – on telling grounds:

> Though the plaintiff alleges that he "had fully and completely surrendered himself to the jurisdiction of the United States," he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen by the state or by the United States.

112 U.S. at 99.

Even Justice Gray's opinion in *Wong* uses these tests as its final foundation. After a very long (though selective and incomplete) analysis of English common law, Justice Gray concludes his analysis by reviewing the statement of facts



agreed upon by the parties. Justice Gray emphasized that the Wongs "ha[d] a permanent domicil and residence in the United States." 169 U.S. at 653. Although they could not have become citizens under the naturalization laws of the time, the Wongs demonstrated the allegiance to the United States sought by both Justice Gray and the authors of the jurisdiction requirement, not by accident of geography, but by explicit indicators of will and intent: "his residence has always been in the United States, and not elsewhere," 169 U.S. at 704; his temporary visits abroad were always made with the intention of returning to the United States, *id.*, he always returned to the United States, *id.*, and neither he nor his parents ever renounced his citizenship or did anything to exclude him from citizenship. 169 U.S. at 704-05. These "talismans of dedicated attachment," *Rogers v. Bellei*, 401 U.S. at 834, were sufficient to show that Wong Kim Ark had been born subject to the complete jurisdiction of the United States.

Justice Gray's concern about using the full jurisdiction requirement was apparent in this passage: "To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States." 169 U.S. at 694. But as shown above, this concern is easily ameliorated by something less than evisceration of the authors' intent to require some form of allegiance; any other form of demonstration of allegiance would produce the same result as it did in his own opinion in *Wong*.

Put simply, in an effort to avoid a perceived ill effect, Justice Gray swung too broadly in *Wong Kim Ark*. In so doing,

he cut down the jurisdiction requirement to something less than its authors and this Court's earlier cases intended.

*B) The Faulty Wong Analysis Lives On and Exacerbates Other National Problems:*

Nevertheless, Justice Gray's analysis in *Wong* lives on. This Court has cited *Wong* with approval, but without further analysis. *See, e.g., Weedin v. Chin Bow*, 274 U.S. 657, 670 (1927)("The majority in [*Wong*], as already said, held that the fundamental principle of the common law with regard to nationality was birth within the allegiance of the government and that one born in the United States, although of a race and of a parentage denied naturalization under the law, was nevertheless, under the language of the Fourteenth Amendment, a citizen of the United States by virtue of the *jus soli* embodied in the amendment."); *Rogers v. Bellei*, 401 U.S. 815, 830 (1971)(Citizenship Clause reflects law existing at the time); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 n.10 (1963)(same).

Other cases have simply asserted that a child of alien parents "born in the United States, was a citizen of this country" without further analysis. *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985)(child of illegal immigrants from Mexico); *Morrison v. California*, 291 U.S. 83, 85 (1933)(child of parents of Japanese descent).

In *Plyler v. Doe*, 457 U.S. 202 (1982), however, the majority opinion went further than earlier cases, by quoting, in a footnote, from Justice Gray's analysis in *Wong* and describing the analysis as detailing "the predominantly geographic sense in which the term 'jurisdiction' was used." 457 U.S. at 211. Yet, as shown *supra*, the authors of the jurisdiction requirement did not suggest any "geographic sense" to the term "jurisdiction;" they were predominantly concerned with



allegiance, since geography was already addressed by birth "in the United States."

Even the *Plyler* dicta employed the same type of "permanence" test used in *Wong* and cited in *Weedin* and *Bellei* to decide that illegal immigrant children should not be charged out-of-state educational tuition. 457 U.S. at 218-19 and n. 17 ("This situation raises the specter of a permanent caste of undocumented resident aliens. . .", *citing* "legalization" or amnesty proposals, and quoting the Attorney General as noting that this "subclass is largely composed of persons with a permanent attachment to the Nation"). The *Plyler* Court noted that the District Court's findings of fact in that case found that the families there "migrated illegally and – for all practical purposes – permanently to the United States." 457 U.S. at 207. In footnote 3, the *Plyler* Court noted the lower court's distinction between these "permanent" illegal residents and "those illegal aliens who entered the country alone . . . and who in many instances remained in this country for only a short period of time." 457 U.S. at 207 n. 3.

The irony of the *Plyler* dicta is that it is more likely to increase the probability of creating "the specter of a permanent caste of undocumented resident aliens," 457 U.S. at 418, than to ease it. The actual result of *Plyler* is to create or strengthen a magnet for more illegal immigration to the United States in the hope of obtaining free education and other welfare benefits. *See,* n. 4 *supra*; *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755 (C.D.Cal. 1995) (citing *Plyler* to strike down ballot initiative – whose chief spokesman was *amicus* Cong. Dana Rohrabacher – to deny social services to illegal immigrants). In the same way, the net effect of the continuing attack on the jurisdiction requirement (by deeming a child born in the United States of any alien to be a citizen without regard

to the jurisdiction requirement) is to encourage more "drive-by citizenship."

The sweeping and imprecise language used in these decisions, however, perpetuates Justice Gray's flawed analysis in *Wong*. The Court should not use similar language in this case, or otherwise further weaken the jurisdiction requirement by describing citizenship as being based solely on geography without reference to the jurisdiction requirement.

**III. Petitioner Hamdi is An Alien Who Has No Allegiance to the United States and Who Was Not Born "Subject to the Jurisdiction" of the United States:**

Wong Kim Ark demonstrated the "allegiance" sought by the jurisdiction requirement, through his and his parents' permanent residence, his actions and his obvious attachment to this country. On the basis of assertions by the Attorney General and findings by the lower court of permanence and attachment to American society, this Court found the same to be true of illegal immigrant families in *Plyler*. 457 U.S. at 207, n. 3.

In this case, however, Hamdi has and can offer no such allegiance or attachment. His and his parents' residence was temporary. Hamdi remained, at all times, subject to another government. Neither Hamdi nor his parents ever demonstrated any intention of remaining in the United States (and, under the terms of a non-immigrant visa as a visitor for business, they could not have done so). They never acted in a manner consistent with attachment to the United States.

Hamdi left the United States as an infant, never to return. He describes himself as a Saudi citizen. Ultimately, Hamdi apparently served as an enemy combatant opposed to the United States and its allied forces.

Hamdi's service in a military force opposed to the United States is a complete denial of his "imperative



obligations of citizenship, performance of which Congress in the exercise of its powers may constitutionally exact. One of the most important of these is to serve the country in time of war and national emergency." *Kennedy v. Mendoza-Martinez*, 372 U.S. at 159.

How, in these circumstances, can Hamdi claim the same citizenship rights as a person who was born "subject to the complete jurisdiction" of the United States? Hamdi is in the same position as John Elk: he may have been born within the territory of the United States, but he shows no "talismans of dedicated attachment." *Bellei*, 401 U.S. at 834.

In this case, Hamdi described himself as a "Saudi citizen." Mobbs Declaration, J.A. 61, ¶ 5. He and his parents were temporary residents of the United States, but at all times owing allegiance to the Kingdom of Saudi Arabia. They were, just as with "Indians not taxed," subject to a foreign power, owing at least partial allegiance to a foreign power, and thus not subject to the jurisdiction of the United States in every way. They were, in short, sojourners, not subject to the complete jurisdiction of the United States.

Petitioner Hamdi was born in the United States, but he has not demonstrated that he has fulfilled the jurisdiction requirement of the Citizenship Clause of the Fourteenth Amendment. He was not born "subject to the jurisdiction" of the United States.

## CONCLUSION

*Amici* therefore respectfully urge the Court to affirm the decision below.

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